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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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NO. 79-5323

* * *

DAVID HERNANDEZ APODACA,
Appellant

V.

THE STATE OF TEXAS,
Appellee

* * *

On Appeal From The County Court At Law No. 2,
El Paso County, Texas

* * *

MOTION TO DISMISS OR AFFIRM

* * *

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Appellee, the State of Texas, moves the Court to affirm the judgment of the County Court at Law No. 2 of El Paso, County, Texas, on the ground that it is in full accord with the dictates of the United States Constitution or to dismiss the appeal because the issues it presents do not raise a substantial federal question.

OPINION BELOW

The unpublished opinion of the court below is attached to Appellant Apodaca's Jurisdictional Statement.

JURISDICTION

Jurisdiction in this Court is proper under 28 U.S.C. §1257(2), since a final judgment has been rendered by the highest Texas court in which a decision could be had and the court below upheld the validity of a state statute against a federal constitutional attack.

STATUTE INVOLVED

Section 38.02(a), Texas Penal Code, reads as follows:

> A person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information.

QUESTIONS PRESENTED

I. Whether Section 38.02(a), Texas Penal Code, is on its face unconstitutionally vague?

II. Whether Section 38.02(a), Texas Penal Code, is unconstitutionally overbroad because it infringes upon rights protected by the First, Fourth, and Fifth Amendments to the United States Constitution as made applicable to the states through the Due Process Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

This is a direct appeal from the final judgment of conviction entered against Appellant Apodaca on July 10, 1979, in Case No. 79-10661 in County Court at Law No. 2, El Paso County, Texas, after trial before the Court.

On June 29, 1979, two uniformed officers of the El Paso Police Department were dispatched in a marked patrol car to a residential neighborhood where a gang fight was reported in progress. Upon arrival at the scene, the officers observed a crowd of approximately 18 to 24 people of varying ages, but predominantly young, milling about. Several were carrying sticks and pipes. The officers saw no blows being struck, but several people in the crowd were yelling and pointing to a young man vigorously riding away from the scene on a bicycle and proclaiming that he had threatened them with a pipe.

While one of the officers remained with the crowd, the other gave pursuit in the patrol car. At first, the pursuing officer could not find the fleeing young man, but after a few minutes he found him hiding behind a rock wall encircling a back yard in the neighborhood. The officer -- Officer Meads -- summoned the man -- who later proved to be Mr. Apodaca -- and told him that, although he was not under arrest, he must return to the scene of the reported gang fight so that matters there

could be straightened out. Mr. Apodaca, who spoke both English and Spanish during this exchange, exhibited some reluctance about going back and thereupon shot the officer "the finger," also known as digitus impudicus. In the meantime, a group of young girls had approached the pair, and discussions were transpiring in Spanish between Apodaca and some of the girls.

At this point, Apodaca became even more reluctant and began to refuse cooperation in loud, vulgar language. Officer Meads then indicated he would arrest him for disorderly conduct and began to frisk him, whereupon Apodaca swung his elbow forcefully around, striking the officer. While Apodaca continued with some resistance, the officer handcuffed him, placed him in the back seat of the patrol car, and drove back to the scene of the reported gang fight.

Once back there Officer Meads asked Apodaca his name and received a vulgarity in response. After being unable to determine Apodaca's name by questioning some people in the crowd, Officer Meads again asked Apodaca his name and, this time, his address. The retort was the same previously uttered vulgarity and a kick of the patrol car seat. Officer Salas -- Officer Meads' partner -- then asked Apodaca his name, and Apodaca's response was that he did not know or remember. After Apodaca was taken to the police station, the two officers as well as several other officers questioned Apodaca in both Spanish and English, asking him numerous times for his name. He never gave it, but it finally was retrieved by feeding Apodaca's fingerprint information into a computer which presumably contained the information because Apodaca at the time was on probation for burglary of a habitation. At about this point -- two hours after stopping

Apodaca -- the officers decided to charge him with a violation of Section 38.02(a) in addition to the two already leveled charges of disorderly conduct and resisting arrest. From the time he was stopped through the time he was charged with failure to identify, Apodaca was not given his Miranda warnings by either Officer Meads or Officer Salas.

After Apodaca was tried and convicted in the municipal court for disorderly conduct and failure to identify, he sought and obtained a trial de novo in the county court at law. There, the criminal charges against Apodaca -- Disorderly Conduct (§42.01, T.P.C.), Resisting Arrest (§38.03, T.P.C.), and Failure to Identify (§38.02(a), T.P.C.) -- were consolidated and tried before the court without a jury. Apodaca was found guilty of all three offenses and sentenced as follows: $45.00 fine plus costs for disorderly conduct; $40.00 fine plus costs for failure to identify; and seven (7) months incarceration, with imposition of sentence suspended and placement on probation for one year, for resisting arrest. The record reflects only an appeal of the conviction for failure to identify, and, since the fine for that offense did not exceed $100.00, the county court at law was the highest court of the state in which a decision could be had, Art. 4.03, Texas Code of Criminal Procedure. Accordingly, an appeal was taken directly to this Court.

ARGUMENT

I.

The Judgment Below Is In Full Accord With The United States Constitution On All The Grounds Presented To This Court.

A. Vagueness. -- Section 38.02(a) on its face is not unconstitutionally vague and therefore does not violate the Due Process Clause of the Fourteenth Amendment.

A penal statute is unconstitutionally vague and, therefore, void under either the Fifth or Fourteenth Amendment's

Due Process Clause if it "'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,'" Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972), quoting from United States v. Harriss, 347 U.S. 612, 617 (1954), or if it encourages arbitrary and discriminatory enforcement. Papachristou v. City of Jacksonville, supra at 162. Section 38.02(a) is not unconstitutionally vague under either of these tests. The elements necessary for a violation of Section 38.02(a) are clear and as precise as can reasonably be expected of statutory language. There must be a lawful stop, a request for the stopped person's name and address, and a refusal by the the stopped person to give his name and address, which refusal must be intentional.

Apodaca argues that the statute's requirement that the stop be a lawful one imparts the unconstitutional vagueness into the law. Brown v. Texas, ___ U.S. ___, 99 S.Ct. 2637 (1979), made clear what the State of Texas had contended on that appeal and continues to contend -- that the phrase "lawful stop" in Section 38.02(a) embodies the concept originating with Terry v. Ohio, 392 U.S. 1 (1968), and continuing through more recent cases such as Delaware v. Prouse, 440 U.S. ____, 99 S.Ct. 1391 (1979). Admittedly, Section 38.02(a) includes in its definition of the crime a constitutional norm, but the Court has twice before rejected vagueness attacks on a statute which refers to constitutional norms in defining a crime. Williams v. United States, 341 U.S. 97 (1951); Screws v. United States, 325 U.S. 91 (1945) (the phrase "rights, privileges, or immunities secured or protected by the constitution" held not to be unconstitutionally vague). That a "willfulness" requirement was read into the statute in Screws, supra, and that "[t]his Court has long

recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea," see Colautti v. Franklin, 439 U.S. 379, 395 (1979), does not signify the invalidity of Section 38.02(a), since it does contain a scienter requirement both within the statute's text and through external directive. See Section 6.02, Texas Penal Code.

Likewise, Section 38.02(a) is not unconstitutionally vague because it does not encourage arbitrary and discriminatory enforcement. It has engrafted upon it the "lawful stop" concept embodied in Terry, supra, which itself was an attempt to discourage the arbitrary and discriminatory enforcement of criminal laws. The use of the identical concept in Section 38.02(a), which has a similar objective, see Section 1.02(5), Texas Penal Code, cannot be said to impart unconstitutional vagueness into the statute, unless this Court intends to concede that its efforts in Terry and its progeny to place some constitutional controls upon street encounters between citizens and law enforcement officials have been futile.

B. Overbreadth. -- The court below's rejection of any overbreadth attack upon Section 38.02(a) should be affirmed. Although Appellant has attempted to invoke the overbreadth doctrine in the context of First, Fourth, and Fifth Amendment rights, overbreadth analysis, or more appropriately, substantial overbreadth analysis, is to be employed only in the context of First Amendment rights. Broadrick v. Oklahoma, 413 U.S 601, 611-18 (1973). Clearly, no First Amendment speech issues are present in this case, since Apodaca has not demonstrated that his silence in the face of the officers' questions is an expression of any moral, religious, artistic, or political idea. Cf. Wooley v. Maynard, 430 U.S. 705 (1977).

His attempt to invoke the First Amendment to the officers' questions about his name and address is an unacceptable approach to constitutional analysis bordering on the absurd. With no First Amendment rights at stake, the Court need not engage in the overbreadth analysis sought by Apodaca.

II.

The Posture Of The Case Before This Court Is Such That No Arguably Meritorious Attack On The Statute Is Squarely Presented And, Therefore, The Appeal Should Be Dismissed For Lack Of A Substantial Federal Question.

Apodaca's Fourth and Fifth Amendment attacks upon Section 38.02(a) are subsumed within his overbreadth claim against the statute. Indeed, the "Questions Presented" portion of Appellant's Jurisdictional Statement is devoid of any reference to either the Fourth or Fifth Amendment. The only questions presented there concern vagueness and overbreadth. See Jurisdictional Statement at p.3. Furthermore, the portion of the Jurisdictional Statement in which Apodaca argues for the substantiality of the federal questions presented by his challenge to the statute tends to treat the Fourth and Fifth Amendments together with other constitutional claims in such a way as to make it unclear how he is arguing that a particular result allegedly flowing from the statute's existence implicates a particular constitutional amendment, whether it be the Fourth or Fifth.

Insofar as Apodaca suggests that the Fifth Amendment as explicated by Miranda v. Arizona, 384 U.S. 436 (1966), prohibits the imposition of criminal sanctions under Section 38.02(a) for failure to give one's name in response to an officer's questioning, his argument must fail. Miranda disavowed its applicability to the kind of encounter addressed in Section 38.02(a). "General on-the-scene questioning

as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding." 384 U.S. 477. See also, Oregon v. Mathiason, 429 U.S 492, 495 (1977). Miranda left law enforcement officers free to ask arrested persons questions for the purpose of obtaining identifying information, such as names. United States v. Prewitt, 553 F.2d 1082 (7th Cir.), cert. denied, 434 U.S. 840 (1977); United States ex rel. Hines v. La Valle, 521 F.2d 1109 (2d Cir. 1975), cert. denied, 423 U.S. 1090(1976); United States v. Grant, 549 F.2d 942 (4th Cir.), cert. denied, 432 U.S. 908 (1977); Morrison v. United States, 491 F.2d 344 (8th Cir. 1973); Farley v. United States, 381 F.2d 357 (5th Cir.), cert. denied, 389 U.S. 942 (1967). Cf. Adams v. Williams, 407 U.S. 143, 146 (1972).

Insofar as Apodaca argues that Section 38.02(a) violates the Fourth Amendment because it permits police officers to make pretextual arrests in the hopes of finding incriminating evidence of more substantial crimes in the ensuing search incident to arrest or with the aim of forcing the arrested person to choose which of his constitutional rights to assert, see, e.g., Michigan v. DeFillippo, ___ U.S. ___, ___, 99 S.Ct. 2627, 2636-37 (1979)(Brennan, J., dissenting), it can only be remarked that that situation, which might raise a substantial federal question if squarely presented, is not presented here. There is no evidence that the statute is being used generally in a pretextual manner. See Michigan v. DeFillippo, ___ U.S. at ____, 99 S.Ct. at 2634 (Blackmun, J., concurring). In this case, Apodaca had already been arrested for one crime and charged with an additional crime before the officers decided to charge him with a violation of Section 38.02(a). Thus, charging him with failure to identify could not conceivably have been

undertaken as a pretext for further incursions upon his privacy, including a full-scale search incident to arrest. The unchallenged, already leveled charges substantially stripped Apodaca of the full protections normally afforded by the Fourth Amendment. Instead, the charge merely imposed sanctions upon him for his failure to fulfill the minimal statutory duty placed upon him by Section 38.02(a) of helping law enforcement officers obtain basic identifying, non-incriminating information about circumstances surrounding a possibly criminal event. There was no incursion upon any of Mr. Apodaca's privacy rights protected by the Fourth Amendment, since he not only had been lawfully stopped but had been lawfully arrested on two other criminal charges prior to his being charged under Section 38.02(a).

CONCLUSION

Appellee respectfully submits that the judgment of conviction entered for failure to identify by the court below should be affirmed. The posture of the constitutional arguments presented to this Court concerning why Section 38.02(a) should be declared invalid on its face is such that no substantial claim of constitutional impropriety in Appellant's conviction has been stated.

Respectfully submitted,

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